

No. 12782

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

PETITION FOR REHEARING.

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FILED

DEC 27 1951

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The undersigned, your petitioner, respectfully submits that he has been aggrieved by an Opinion of Your Honors rendered herein on the 28th day of November, 1951, in the respects hereinafter set forth, and urgently prays for a rehearing of said matter on the following grounds:

I.

The Opinion places in jeopardy all claims of California State taxing agencies presently pending in bankruptcy proceedings in the Federal bankruptcy courts in this State, inasmuch as the form of the proof of claim involved in the instant appeal and the language contained therein have been employed by all State taxing agencies for a period of in excess of five years and are presently to be found in all pending claims.

II.

Reference to the amended proof of claim involved in the instant appeal [Tr. 26-32] will disclose that the vital facts to support the proof of claim, namely, the levy of tax assessments, their non-payment and the existence of a tax lien under State law have been positively asserted under oath as required by Section 57(a) of the Bankruptcy Act (11 U. S. C. 93] and not upon "information and belief" as the Opinion filed November 28, 1951, would appear to indicate.

Although it is positively asserted in line 6 at page 3 of the printed Opinion that "here the oath is upon information and belief," reference to the first paragraph of the amended proof of claim [Tr. 26] will disclose that it reads as follows: "On the sixteenth day of October, 1946, came Ewing Haas, and made oath and said that he is a Deputy Controller of the State of California and as such is qualified and empowered to make this claim on behalf of the State of California;" . . .

Following the preceding quoted first paragraph, there appear a series of paragraphs, set off by semicolons, each paragraph commencing with "That." The words "informed and believes" appear only in the first paragraph commencing with "That" and in no way modify the succeeding positive averments.

Although we are necessarily required to go outside the record to explain to the Honorable Court why the words "informed and believes" appear not only in the second paragraph of the instant proof of claim but in the equivalent paragraph of all State tax claims, in view of the serious nature of the conclusion reached by the Court in the instant appeal regarding the character of State tax claims, we are compelled to direct the Court's attention

to the fact that the words "informed and believes" are employed solely by virtue of the fact that a proof of claim executed on behalf of any State agency must of necessity be executed by an executive officer who derives his information from official State records. Although we are aware that claims filed by the Collector of Internal Revenue do not contain the words "informed and believes" as used in the proofs of claim filed by California taxing agencies, this Court can take judicial notice of the fact that the Collectors in San Francisco and Los Angeles necessarily execute their proofs of claim solely in reliance upon their official records as is the case with the State taxing officials.

Subsequent to the filing of the Court's Opinion in this matter on November 28, counsel for appellant herein, in appearing on behalf of the California State Board of Equalization at a hearing had upon objections filed by a trustee in bankruptcy to a claim for taxes due under the California Sales and Use Tax Law, was faced with meeting the argument that the Board's claim was not *prima facie* valid by virtue of the presence of the words "informed and believes" and this Court's Opinion of November 28, 1951. Counsel for the Board of Equalization requested and was granted leave to file an amended proof of claim eliminating the words "informed and believes," but the fact remains, regardless of the language employed in proofs of claim hereafter filed, that executive officers of State taxing agencies are in the same position as Collectors of Internal Revenue with respect to their personal knowledge of the status of thousands upon thousands of taxpayer accounts. It is of grave importance to all California State taxing agencies that a petition for rehearing be granted for the purpose of obtaining a full and de-

tailed consideration of the effect of the presence of the word "informed and believes" in proofs of claim filed by California taxing agencies inasmuch as it would appear under the decision in *In re United Wireless Telegraph Co.*, 201 Fed. 445, that the verification of the claim involved in the instant appeal was *not* made upon information and belief.

III.

It is a well established principle that tax determinations levied by Federal and State taxing officials are presumed to be correct.

Schwartz v. United States, 70 Fed. Supp. 437 (D. C. Cal.);

Shea v. Commissioner, etc. (9th Cir.), 81 F. 2d 937;

Gordon v. Commissioner, etc. (9th Cir.), 75 F. 2d 429;

Wehe v. McLaughlin (9th Cir.), 30 F. 2d 217.

See also:

People v. Mahoney, 13 Cal. 2d 729;

People v. Schwartz, 31 Cal. 2d 59;

California Code of Civ. Proc., Sec. 1963, subd. 15.

The Opinion filed November 28, 1951, gives no effect to the presumption of correctness attaching to Federal and State tax assessments and it would appear that objection might validly be made to claims filed by Collectors of Internal Revenue, as objection was made here, by subpoenaing the Collectors and adducing testimony from them to

the effect that they relied solely upon their official records in executing proofs of claim for Federal tax liabilities. It is respectfully submitted that a rehearing should be granted to preclude a possible serious attack upon the allowance of all Federal and State tax claims in bankruptcy proceedings predicated upon the inherent character of Federal and State taxing agencies and the vulnerability of Federal and State tax claims if the presumption of correctness attaching to Federal and State tax assessments is disregarded.

IV.

It is stated in the Opinion at page 3, in the first paragraph, that when the Referee in Bankruptcy required appellant-claimant to go forward with his proof he did so “realizing no doubt that since the verification of the claim was upon the affiant’s information and belief, the claim lacked the evidentiary weight of presumptive validity.”

Present counsel for appellant feel obligated to former counsel who represented appellant at the hearing before the Referee, and who is presently a judge of the Superior Court in the County of Los Angeles, to direct the Court’s attention to the erroneous nature of its conclusion. Reference to pages 94 to 101 of the transcript will disclose that former counsel for appellant *did* take the position that appellant’s claim was *prima facie* valid and that he proceeded to go forward as the Referee required him to do without receding from that position. Although what occurred during the short recess referred to at page 97 of the transcript is not a part of the record in this case, this Court’s atten-

tion is respectfully directed to the fact that former counsel complied with the Referee's ruling purely to protect appellant's position in view of the large sum of money involved. Inasmuch as the Opinion as it now reads might be construed as perhaps unfairly reflecting on former counsel, we respectfully offer to submit an affidavit of former counsel for the Court's consideration, and in any event respectfully request the Court to reconsider the conclusion reached in this respect.

V.

Present counsel also find themselves in somewhat of a dilemma regarding their own position in the instant appeal. It is stated at page 3 of the Opinion filed November 28, 1951, that appellant "in its brief expressly disclaims any attack on . . . [the referee's] ruling . . ." regarding the *prima facie* validity of appellant's tax claim. Actually, the problem presented appears to be a semantic one inasmuch as Edward Sumner, Esquire, who personally drafted appellant's briefs in the instant matter, is prepared to state under oath that he did not in any manner or form intend by any language used to infer that appellant did not positively assert and rely upon the *prima facie* validity of its tax claim. It would indeed be unfortunate if the choice of language used by counsel for a party were to prejudice his client's case, solely because of a semantic difficulty. (See App. Op. Br. pp. 8, 43-46.)

It is respectfully requested that a petition for rehearing be granted and that the Opinion filed November 28, 1951, be reconsidered in this respect.

VI.

In considering the evidence adduced before the Referee, it is stated in the second paragraph of page 3 of the Opinion filed November 28, 1951, that appellant's case "rested solely upon . . . [the] difference between purchases and sales and the inability or refusal of the bankrupt to produce evidence that the tax was or had been paid on the excess."

The foregoing quoted statement does not fully set forth appellant's position. As we have previously pointed out to this Court, the California Motor Vehicle Fuel License Tax Law (California Revenue and Taxation Code, Div. 2, Part 2) imposes upon "distributors" a tax for the privilege of "distributing" motor vehicle fuel in this State. "Distribution" is defined as including "the sale" of motor vehicle fuel in this State and a "distributor" is defined as including every person who within the meaning of the term "distribution" distributes in this State motor vehicle fuel of which there has been no prior taxable distribution, or who receives in this State motor vehicle fuel of which there has been no prior taxable distribution. Section 7354 of the Law provides that there shall be only one taxable distribution and all brokers and distributors are required to keep accurate records from which the State agency can account for all taxable distributions in the entire State. (See, also, Sections 8301 to 8307.) In other words, the statute is so designed that the State agency can at any time, through the records required to be kept by law, check the distribution of all motor vehicle fuel.

When the investigators for the State agency testified that they had been unable to ascertain the precise sources from which Lockwood had derived the gallonage in question, they were testifying that Lockwood had not obtained

the gallonage from a licensed distributor, or, to put it differently, from a tax-paid source. We respectfully submit that the failure of the investigators to ascertain the illicit source from which Lockwood derived the gallonage in question should not be permitted to prejudice appellant's position since even if the source had been discovered it could obviously not have been a tax paid source.

We respectfully submit that there is indeed a factual basis for the Referee's conclusion and that the Referee's conclusion was not predicated merely upon suspicion and surmise. It is to be noted that Lockwood did purport to explain away the gallonage in question by stating that the State's auditors had duplicated certain items. It is to be noted that this explanation (see App. Op. Br. p. 22, *et seq.*) was spurious. It is also to be noted that when given the opportunity to do so Mr. Lockwood was unable to specify any legitimate source from which the gallonage in question had been obtained but resorted solely to the monosyllabic denial that he had ever purchased motor vehicle fuel from other than a licensed distributor, and to a monosyllabic affirmance that all the gasoline purchased by him during the periods in question were tax paid, despite the fact that the records examined by and available to the State agencies reflected all taxable distributions in the State of California but did not disclose a taxable distribution to Mr. Lockwood or to any source from which Mr. Lockwood might have derived the gallonage upon which appellant's claim is predicated.

We agree entirely with the views expressed by this Court that a Referee should not be governed merely by suspicion, but in this instance can it be said that the Referee was guided merely by suspicion when the testimony adduced before him established that a check of all

legitimate sources failed to disclose a prior taxable distribution of the gallonage in question to Lockwood and that Lockwood himself could not point to a legitimate source?

It is respectfully submitted that a petition for rehearing should be granted and this aspect of the Opinion reconsidered in light of such decisions as *Cohen v. Commissioner*, 176 F. 2d 394, and *Greenfield v. Commissioner*, 165 F. 2d 318, which stand for the propositions that the silence of a taxpayer who should know most about the matter involved is entitled to great weight and that an incredible explanation may properly be rejected.

VII.

The concluding paragraph of the Opinion filed November 28, 1951, states that there is no merit to appellant's argument "that the trustee was not competent to prosecute the review." It is stated in the concluding sentence of that paragraph that after bankruptcy "the trustee stood in the place of the bankrupt and could avail himself of defenses as fully as the bankrupt." We should, however, in this connection, like to direct the Court's attention to the decisions in *In re Pramer*, 131 F. 2d 733, and *In re Sawilowsky*, 284 Fed. 975 (affirmed 288 Fed. 533), which stand for the proposition that a bankrupt has no standing in ordinary bankruptcy proceedings to petition for review of orders allowing claims. If Lockwood himself, after adjudication, had no standing to petition for review, it is respectfully submitted that the trustee standing in the place of the bankrupt was in no better position.

Wherefore, petitioner respectfully and urgently prays that a rehearing be granted and that the mandate of this Court be stayed pending the disposition of this petition.

Respectfully submitted,

CONTROLLER OF THE STATE OF CALIFORNIA,

By EDMUND G. BROWN,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Appellant.

Certification.

I, EDWARD SUMNER, Deputy Attorney General of the State of California, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of Controller of the State of California, Appellant, v. Arlie R. Lockwood, Bankrupt, Appellee, is well founded and that it is not presented for the purpose of creating a delay.

EDWARD SUMNER.